IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT WILLIAM PROUDFOOT	:	CIVIL ACTION
v.	:	
DONALD T. VAUGHN, ET. AL.	:	NO. 94-590

M E M O R A N D U M

Padova, J. July 2, 1997

Robert William Proudfoot, an inmate at the State Correctional Institution at Graterford, Pennsylvania, filed a pro se Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C.A. § 2254 (West 1994 & Supp. 1997). This Court referred Proudfoot's Petition to United States Magistrate Judge Thomas J. Rueter for a Report and Recommendation ("R & R"), pursuant to 28 U.S.C.A. § 636(b)(1)(B) (West 1993). Magistrate Judge Rueter recommended that the Court dismiss the Petition, and Proudfoot filed objections.[1] For the reasons that follow, the Court will overrule Proudfoot's objections, adopt Magistrate Judge Rueter's R & R, and dismiss Proudfoot's Petition.

I. Facts

On March 4, 1989, Proudfoot was arrested and charged with various offenses stemming from allegations that, while armed with

[1] Respondents, Donald Vaughn, the Pennsylvania Attorney General, and the District Attorney of Chester County also filed objections which the Court addresses, infra.

a shotgun, he threatened and physically intimidated David Thomas in a dispute concerning the ownership of certain motorcycles. On September 27, 1989, Proudfoot, before the Honorable Leonard Sugerman, President Judge of the Court of Common Pleas of Chester County, was convicted by a jury of terroristic threats, 18 Pa. Cons. Stat. Ann. § 2706, simple assault, 18 Pa. Cons. Stat. Ann. § 2701(a)(3), recklessly endangering another person, 18 Pa. Cons. Stat. Ann. § 2705, and criminal conspiracy to commit each of those crimes. 18 Pa. Cons. Stat. Ann. § 903(a)(1). Post-trial motions were denied on March 5, 1990. On April 23, 1990, Judge Sugerman sentenced Proudfoot to 5 to 10 years imprisonment. Throughout those proceedings, Proudfoot was represented by Robert J. Donatoni.

On May 2, 1990, Judge Sugerman permitted Mr. Donatoni to withdraw as Proudfoot's counsel. On June 7, 1990, Vincent DiFabio was appointed to represent Proudfoot. On September 11, 1990, Judge Sugerman granted Proudfoot's motion to file an appeal nunc pro tunc, notwithstanding the fact that the time for filing a direct appeal had lapsed. On September 13, 1990, Proudfoot filed an appeal to the Superior Court, challenging only the sufficiency of the evidence in support of the jury verdicts. Judge Sugerman filed an opinion addressing the issues which Proudfoot raised on appeal on July 31, 1991. On September 16, 1991, Proudfoot's appellate brief was filed. On February 20, 1992, while his direct appeal was pending before the Superior Court, Proudfoot petitioned this Court for a writ of habeas corpus. On May 8, 1992, the Superior Court rejected Proudfoot's direct appeal. On July 17, 1992, this Court

adopted the R & R of Magistrate Judge Tullio Gene Leomporra and dismissed Proudfoot's petition for failure to exhaust state remedies. On August 27, 1992, the Pennsylvania Supreme Court denied allocatur. On October 19, 1992, Proudfoot filed a pro se petition in state court under the Post Conviction Relief Act, 42 Pa. Cons. Stat. Ann. §§ 9541-9551 (West 1982 & Supp. 1997) ("PCRA"). Since that time, Proudfoot has had five different court-appointed attorneys.[2] On January 31, 1994, Proudfoot filed his second petition for a writ of habeas corpus with this Court. In September 1994, court appointed counsel filed an amended PCRA petition. A hearing on Proudfoot's PCRA petition was scheduled for October 25, 1994. On October 7, 1994, this Court adopted the second R & R of Magistrate Judge Leomporra and again dismissed Proudfoot's petition for failure to exhaust state remedies, noting that a hearing on the PCRA petition was forthcoming.

However, on February 16, 1995, because the scheduled October 25, 1994 PCRA hearing was never held, and because no other hearing had been held since, this Court vacated its October 7, 1994 Order and activated Proudfoot's federal habeas process. On July 17, 1995, pursuant to evidentiary hearings held in April and May of 1995, Judge Sugerman denied Proudfoot's PCRA petition. On July 25, 1995, pursuant to the doctrine enunciated in Walker v. Vaughn, 53

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[2] On November 19, 1992 Robert Brendza was appointed PCRA counsel. On December 9, 1992, John Carnes was appointed. On January 20, 1993, Joseph Nescio was appointed. On December 14, 1993, Steven Baer was appointed. On February 10, 1994, John Winicov was appointed.

F.3d 609 (3d Cir. 1995), this Court stayed Proudfoot's habeas proceeding, it appearing that the state post-conviction process was again underway. On August 15, 1995, Proudfoot filed a notice of appeal from the denial of his PCRA petition.

On January 29, 1997, this Court vacated its July 25, 1995 Order and reactivated Proudfoot's habeas review because 18 months had elapsed since Proudfoot had filed his appeal from Judge Sugerman's denial of his PCRA petition, during which time no action had been taken on the appeal. Proudfoot's appeal to the Superior Court concerning the denial of his PCRA petition is still pending.

Proudfoot's habeas Petition, along with his application for release from custody pending resolution thereof, was referred to Magistrate Judge Rueter for an expedited R & R on the merits. On March 13, 1997, Magistrate Judge Rueter issued a 38-page R & R that Proudfoot's Petition be denied. On March 24, 1997, Proudfoot filed objections to the R & R and on May 27, 1997, the Court received a memorandum in support of those objections.[3]

II. Standard of Review

"[A] district court shall entertain an application for a writ

[3] Proudfoot initially filed 31 conclusory objections in a mere three pages, reflexively taking exception to every finding in Magistrate Judge Rueter's R & R. The lengthy recitation of objections failed to furnish (1) a single citation to the voluminous record in this case, (2) a single reference to any case law and (3) any substantial analysis. For this reason the Court ordered Proudfoot to file a memorandum. The Court received a 45-page memorandum on May 27, 1997, which shall be treated as superseding that initial litany of objections.

of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Where a habeas petition has been referred to a magistrate judge for an R & R, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . . [T]he court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. § 636(b).

III. Discussion

Proudfoot argues that he is entitled to habeas relief on the following grounds: (1) inordinate delay in direct review of his conviction by the state system; (2) inordinate delay in collateral review of his conviction by the state system; and (3) the ineffectiveness of trial and appellate counsel. These contentions are addressed below seriatim.

A. Inordinate Delay in Direct Review

Although the United States Supreme Court has not expressly recognized a criminal defendant's right to a speedy appeal, Simmons v. Beyer, 44 F.3d 1160, 1169 (3d Cir.), cert. denied, 116 S. Ct. 271 (1995), the United States Court of Appeals for the Third Circuit has found that the "Due Process Clause guarantees a reasonably speedy appeal if the state has chosen to give defendants

the right to appeal." Id. (citation and internal punctuation omitted). In the Commonwealth of Pennsylvania, that right is enshrined in the state constitution. Pa. Const. art. V, § 9 ("[t]here shall . . . be a right of appeal . . . from a court of record . . . to an appellate court . . . ."). Given the existence of a right to a speedy appeal in this Commonwealth, the four factors employed in evaluating claims of unconstitutional appellate delay are: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right and, (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972); Beyer, 44 F.3d at 1169-70 (applying Barker criteria to determine whether appellate delay violated due process); Burkett v. Cunningham, 826 F.2d 1208, 1226-27 (3d Cir. 1987) ("Burkett I") (same). Of the four Barker factors, the Supreme Court noted that "[w]e regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation . . . . Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." 407 U.S. at 533, 92 S. Ct. at 2193.

1. Length of Delay

Two years lapsed between the imposition of sentence and affirmance of that sentence by the Superior Court. Without minimizing the significance of this delay, the Court notes that it

is considerably shorter than the delays which other courts have found to rise to the level of due process violations. Beyer, 44 F.3d at 1170 (finding due process violation in view of 13 year delay between sentencing and direct appeal); Burkett I, 826 F.2d at 1225-26 (five and one half year delay in sentencing, and hence appeal, was factor in warranting discharge). See also Coe v. Thurman, 922 F.2d 528, 531 (9th Cir. 1990) ("[w]e can agree that four years [in which an appeal is pending] is an alarming amount of time; standing alone, however, it does not require a granting of the writ. We must assess the other three factors as well"); Simmons v. Reynolds, 898 F.2d 865, 868 (2d Cir. 1990) (six year delay in defendant's appeal denied him due process).

2. Reason for Delay

About four months of the appellate delay may be attributed to the withdrawal of Mr. Donatoni and the appointment of Mr. DiFabio as counsel. Another nine month delay was occasioned by the failure of the trial judge to deliver a written opinion explicating his denial of the post-trial motions.[4] It took another seven months, after receiving both Judge Sugerman's written opinion as well as Proudfoot's brief, for the Superior Court to affirm. "'[F]ailures of court-appointed counsel and delays by the court are attributable to the state.'" Beyer, 44 F.3d at 1170 (quoting Coe, 922 F.2d at

[4] Pa. R. App. P. 1925(a) requires the filing of an opinion "forthwith" and no later than forty days from the filing of the appellant's statement of matters complained of on appeal. Pa. R. App. P. 1931(a).

531). Thus, the entire delay is attributable to the state.

3. Assertion of the Right

With respect to this prong, I agree with Magistrate Judge Rueter's finding that:

> [b]y letter dated September 14, 1991, [Proudfoot] wrote to his court-appointed counsel, Vincent P. DiFabio, Esquire, requesting him to raise the issue of inordinate delay in the appellate process . . . . On October 16, 1991, [Proudfoot] filed a pro se motion for remand to the Superior Court. In that motion, which was denied on December 13, 1991, [Proudfoot] did complain of "inordinate delay" between the date of his conviction and the direct appeal . . . . He next raised the issue in a habeas corpus petition filed in this court on February 20, 1992. He again raised the issue in his pro se PCRA petition which he filed with the trial court on October 19, 1992, after the Superior Court affirmed his conviction on May 8, 1992 . . . . These protestations by [Proudfoot] fulfill his obligation that he assert his right to a speedy appeal.

(R & R at 13-14).

4. Prejudice

As the Third Circuit observed in Burkett I,

> [i]n adapting the prejudice prong of the Barker analysis to appellate delays, courts have identified three interests in promoting prompt appeals:
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> (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.

826 F.2d at 1222 (citation omitted).

As to the first prejudice prong, "the incarceration would be unjustified and thus oppressive were the appellate court to find .

. . [the] conviction improper. If it affirms the conviction, however, the incarceration will have been reasonable." Coe, 922 F.2d at 532 (citation omitted). Given that the Superior Court affirmed the conviction and the Pennsylvania Supreme Court denied allocatur, Proudfoot's incarceration was not unreasonable.

As to the second prong, the Third Circuit has recognized that delay-related anxiety in the pre-trial context, where the presumption of innocence attaches, is given more weight than delay-related anxiety in the post-conviction context, where a defendant "is incarcerated under a presumptively valid adjudication of guilt." Heiser v. Ryan, 15 F.3d 299, 305 (3d Cir.) (citation omitted), cert. denied, 513 U.S. 926, 115 S. Ct. 313 (1994) ("Heiser II").

There is no question that the passage of time without resolution of his appeal caused Proudfoot anxiety and emotional discomfort. Regrettably, under the case law, this alone is insufficient to warrant a finding of prejudice. Id. ("although we do not depreciate the significance of personal prejudice in the form of anxiety as an element to be considered in the Barker analysis, we have previously recognized that a certain amount of anxiety is bound to accompany criminal charges, and only unusual or specific problems of personal prejudice will satisfy the Barker test . . . .") (citation omitted).

Finally, Proudfoot has not carried his burden under the third prong of the prejudice test. The passage of time with no decision on an appeal has been found to be prejudicial when it results in

"the possibility that [the] convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." Burkett I, 826 F.2d at 1225 (citation and internal quotation marks omitted). Although it was clearly long in coming, Proudfoot did eventually receive all the direct review to which he was entitled. This review lead neither to reversal nor retrial.

At this point, therefore, unlike the petitioner in Burkett I, Proudfoot cannot rely on hypothetical impairment as the basis for prejudice. Instead, given the procedural posture of this case, Proudfoot must show actual impairment of his defenses on appeal attributable to the delay, which he has not. Beyer, 44 F.3d at 1170 ("[i]f [petitioner] had received an adequate and effective, though excessively delayed appeal, then the issue of prejudice would become more difficult"); Heiser II, 15 F.3d at 303-04 (11 1/2 year delay in hearing motion to withdraw guilty plea did not warrant habeas relief where petitioner's ability to show coercion was not impaired). See also Harris v. Champion, 15 F.3d 1538, 1566 (10th Cir. 1994) (once conviction affirmed, no entitlement to habeas relief "unless petitioner can show actual prejudice to the appeal, itself, arising from the delay"); United States v. Tucker, 8 F.3d 673, 676 (9th Cir. 1993) (despite three and one half year delay, once his conviction was affirmed, petitioner received all he was due from the legal process), cert. denied, 510 U.S. 1182, 114 S. Ct. 1230 (1994); Allen v. Duckworth, 6 F.3d 458, 460 (7th Cir. 1993) (despite a four and one half year delay, habeas corpus action became moot once petitioner's conviction was affirmed), cert.

denied, 510 U.S. 1132, 114 S. Ct. 1106 (1994); Muwwakkil v. Hoke, 968 F.2d 284, 285 (2d Cir.) (13-year delay prior to direct appeal did not warrant habeas relief where conviction was ultimately affirmed because there was no actual prejudice), cert. denied, 506 U.S. 1024, 113 S. Ct. 664 (1992); United States v. Johnson, 732 F.2d 379, 382-83 (4th Cir.) (once appeal was heard and found lacking in merit, there was no basis for ordering defendant's release), cert. denied, 469 U.S. 1033, 105 S. Ct. 505 (1984).

The first Barker prong -- length of the delay -- weighs only mildly, if at all, in favor of finding a due process violation. The second and third Barker factors -- attribution of the delay to the state and petitioner's vigilant assertion of his right, respectively -- weigh in favor of finding such a violation. However, with respect to the fourth prong, because the delays, regrettable as they are, lead to no impairment of Proudfoot's defenses, I conclude that the needless temporal elongation of Proudfoot's direct appellate review ultimately resulted in no due process violation.[5]

B. Inordinate Delay in State Collateral Review

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[5] Even if the Court had found there to be a due process violation, this would not necessarily have lead to a granting of the writ. See Heiser II, 15 F.3d at 307 ("[w]e do not denigrate the significance of a prompt determination by the state courts, but if the delay reached the level of a due process violation . . . Heiser's relief would be in a suit for damages under 42 U.S.C. § 1983 rather than release via a writ of habeas corpus"); Burkett I, 826 F.2d at 1222 ("[t]he normal remedy for a due process violation is not discharge").

The threshold question in relation to this claim is whether there exists a due process right to a speedy state collateral appeal after direct review. The United States Court of Appeals for the Seventh Circuit has decided this question:

> No constitutional provision or federal law entitles [a habeas petitioner] to any state collateral review, Pennsylvania v. Finley, 481 U.S. 551, 557, 107 S. Ct. 1990, 1994 . . . (1987), let alone prompt collateral review. Unless state collateral review violates some independent constitutional right, such as the Equal Protection Clause, see, for example, Lane v. Brown, 372 U.S. 477, 484-85, 83 S. Ct. 768, 772-73 . . . (1963); Smith v. Bennett, 365 U.S. 708, 81 S. Ct. 895 . . . (1961), errors in state collateral review cannot form the basis for federal habeas corpus relief . . . . Thus, we cannot say that mere delay in receiving a ruling on [a] state [petition for collateral relief] violates the Due Process Clause . . . . Due process does not include prompt resolution of collateral appeals. Whereas a direct criminal appeal has now become a fundamental part of the criminal justice system . . . state post-conviction relief is not part of the criminal proceeding -- indeed, it is a civil proceeding that occurs only after the criminal proceeding has concluded. Finley, 481 U.S. at 557, 107 S. Ct. at 1994; see also Murray v. Giarratano, 492 U.S. 1, 10, 109 S. Ct. 2765, 2770-71 . . . (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either trial or appeal.") Delay in processing that collateral claim does not make the continued imprisonment of the defendant unlawful, and hence, does not warrant federal habeas corpus relief.

Montgomery v. Meloy, 90 F.3d 1200, 1206 (7th Cir.) (certain internal citations omitted), cert. denied, 117 S. Ct. 266 (1996); Culbreath v. Vaughn, No. Civ. A. 92-490, slip op. at 4 (E.D. Pa. Nov. 30, 1992) (stating that "an inordinate delay in the processing of a state post-conviction petition poses no federal constitutional violation").

The remedy for inordinate delay in state collateral review is

the waiver of the requirement that a petitioner exhaust state court remedies in order to receive federal habeas review. Burkett I, 826 F.2d at 1218. See also Jackson v. Duckworth, 112 F.3d 878, 881 (7th Cir. 1997). Were it otherwise, "a state prisoner would be entitled to a release from confinement . . . even though his state criminal trial and direct appeals were constitutionally flawless." Id. at 880. This Court already waived the exhaustion requirement when it reactivated Proudfoot's habeas Petition in January 1997. Proudfoot, therefore, has already been afforded the remedy to which he is entitled as a consequence of the delay in his state collateral proceedings.

The Court's decision does not constitute an endorsement of the manner in which Proudfoot's attempts to receive the process to which he is entitled under state law have been treated. To say that these delays do not offend the Constitution is by no means to excuse them.

C. Ineffectiveness of Counsel

The well-established standard for evaluating claims of ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064. Strickland further specifies that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068. The defendant must show that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. Id. at 688, 104 S. Ct. at 2064-65. The reviewing court must be "highly deferential" in evaluating counsel's performance and "must indulge a strong presumption" that under the circumstances, the challenged action "might be considered sound trial strategy." Id. at 689, 104 S. Ct. at 2065 (citations and internal quotations omitted). See also Berryman v. Morton, 100 F.3d 1089 (3d Cir. 1996); Sistrunk v. Vaughn, 96 F.3d 666 (3d Cir. 1996).

1. Shotgun Shells

Proudfoot first argues that

> [t]he failure to move simultaneously with the motion to suppress the shotgun for a motion to suppress the shells is clear error on the part of the defendant's counsel. If the shells were seized as a result of the same stop and arrest that the trial judge concluded were unconstitutional they would be equally subject to suppression.

(Pet'r Mem. Supp. Objections Magistrate Judge's R & R at 24) ("Pet'r Mem."). At the suppression hearing held on September 25, 1989, before Judge Sugerman, it appears that Mr. Donatoni, in fact, did move to suppress the shotgun shells:

Mr. Donatoni: Your Honor, this is the case of Commonwealth versus Robert Proudfoot . . . . We are here on a motion to suppress physical evidence . . . . And specifically, sir, what I am seeking to suppress is a shotgun seized from an automobile on March 3, 1989 . . . There were also seized three shotgun shells from the person of Mr. Proudfoot.

(Tr. Suppression Hr'g 9/25/89 at 3-4). The trial court went on to rule on the admissibility of both the shotgun and the shells.

The Court: We recognize that the investigative stop and any search that occurs is, of course, an exception for the Fourth Amendment. I am not satisfied in this case that the Commonwealth has proved by a fair preponderance that the officer articulated facts which, taken together with rational inferences from those facts, permitted the intrusion and, thereupon, suppress the shotgun.

Mr. Donatoni: And the shells your Honor?

The Court: There is no evidence about the shells at all. I understand they were given to the police officers by the defendant at some other point and, as a result, there being nothing in the record, the shells are not suppressed . . . .

(Tr. Suppression Hr'g 9/25/89 at 50).

Based on the record, I cannot say that Mr. Donatoni's professional conduct as to the shells was deficient under the first prong of Strickland. On the contrary, he appears to have been fairly vigilant in that he called the court's attention to the shells, as distinct from the shotgun, twice: both at the beginning of the hearing as well as at its very end.

2. Juror

Proudfoot contends that "[t]rial counsel was further ineffective for leaving a juror on the panel where that juror,

Deanna Dolbow, was a daughter of a victim in a prior offense allegedly committed by [Proudfoot]." (Pet'r Mem. at 29). At the PCRA hearing, however, Mr. Donatoni testified that Proudfoot failed to advise him of the connection with Ms. Dolbow, but had he been so advised, he would have moved to strike her from the jury.

Question: Okay. Do you remember during [jury] selection being told by your client that [Ms. Dolbow] was the daughter of a neighbor?

Mr. Donatoni: No.

Question: Okay. Is it your testimony that you did not receive information from your client during selection that he in fact knew [Ms.] Dolbow?

Mr. Donatoni: No. Let me be clear. Had I been told that which is alleged, that this woman was the daughter, or was related to a victim of a crime that Mr. Proudfoot was alleged to have perpetrated prior to the Trial, that woman would not have sat on the Jury. I don't think Judge Sugerman would have allowed her, if she answered on voir dire, to have sat . . . . I would have made a challenge for cause. And certainly would have exercised a peremptory challenge if my challenge for cause was not granted.

(Tr. PCRA Hr'g 4/21/95 at 20). Assessing this testimony, the trial court

> fully credit[ed] Mr. Donatoni's testimony on the subject and f[ou]nd the Defendant's [position] to be meritless, as Mr. Donatoni was not advised by the Defendant of the earlier incident allegedly involving the Defendant and relatives of Ms. Dolbow . . . .

Commonwealth of Pennsylvania v. Proudfoot, No. 903-89, slip op. at 7 (Ct. C. P., Chester County Jan. 29, 1997). As to this finding, the applicable habeas statute[6] provides that "a determination after

[6] As the instant Petition was pending on April 24, 1996, the habeas amendments enacted pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110

a hearing on the merits of a factual issue, made by a State court . . . evidenced by a written finding . . . shall be presumed to be correct, unless the applicant shall establish" any of the eight enumerated exceptions. 28 U.S.C.A. § 2254(d) (West 1994). Since Proudfoot does not meet any of those exceptions, the Court defers to the state court's determination that Mr. Donatoni was unaware of Ms. Dolbow's background. Therefore, Mr. Donatoni could not have been deficient under Strickland in omitting to strike her from the jury.

3. Impeachment of Derrickson

Proudfoot contends that

> trial counsel failed to impeach the state's witness, [Scott Derrickson], with respect to the plea bargain he received for testifying against the petitioner. If [] trial counsel had known of the plea bargain and failed to make use of it this would constitute ineffectiveness on his part.

(Pet'r Mem. at 25). At trial, Mr. Donatoni engaged in a lengthy and vigorous cross-examination of Mr. Derrickson designed to elicit whether his testimony may have been colored by collaboration with the Commonwealth.

Stat. 1214 (1996) ("AEDPA"), are not applicable. Lindh v. Murphy, No. 96-6298, 1997 WL 338568, at *2 (U.S. June 23, 1997) ("[t]he issue in this case is whether that new section of the [AEDPA] dealing with petitions for habeas corpus governs applications in noncapital cases that were already pending when the Act was passed. We hold that it does not"); Johnston v. Love, 940 F. Supp. 738, 744 n.2 (E.D.Pa. 1996) (Pollak, J.) (same). This disposes of Respondents' objection to Magistrate Judge Rueter's finding that the AEDPA habeas amendments do not apply to the instant Petition.

Question: You, as of late last week, started to negotiate through your attorney to make a plea bargain in this case, did you not?

Mr. Derrickson: Yes, I did.

Question: And the Commonwealth offered you a plea bargain, whereby you would admit your guilt or your involvement to some offense in exchange for a five month prison sentence, correct?

Mr. Derrickson: Yes.

* * *

Question: And the only way that you knew to reduce that, or attempt to reduce that five months imprisonment was to give testimony against Rob Proudfoot, correct?

Mr. Derrickson: Correct.

* * *

The Court: Well, let me be sure the Jury understands this. You have an arrangement with the Commonwealth to this extent, as I understand what you have said, that you will plead, without the benefit of any bargain, concerning a sentence subject to the discretion of the Judge, as he decides to sentence you, and the Commonwealth at the time of your sentencing will ask the Judge, the sentencing Judge, to take into consideration your truthful testimony in this case; is that the extent of your arrangement?

Mr. Derrickson: Yes, your Honor.

(Tr. Trial 9/26/89 at 45-50). At the PCRA hearing before Judge Sugerman, Mr. Donatoni offered the following testimony.

Question: Were you possessed of any information that you did not use in cross-examining the witness Scott Derrickson concerning any deals or plea agreements he had with the Commonwealth in return [for] his testimony?

Mr. Donatoni: Was I not in possession?

Question: No. Was there anything you were knowledgeable about that you did not use in cross-examination?

Mr. Donatoni: No. I used everything I had to impeach him.

(Tr. PCRA Hr'g 5/22/95 at 18). Given Mr. Donatoni's cross-examination of Mr. Derrickson at trial, his testimony at the PCRA hearing and the information he had at that time,[7] I cannot say that his professional conduct was deficient under Strickland.

4. Other Witnesses

Proudfoot argues that "[t]rial counsel compounded his errors by failing to interview witnesses[8] that would have testified favorably for the petitioner in the face of his decision not to have the defendant testify himself." (Pet'r Mem. at 25). At the PCRA hearing, Mr. Donatoni denied that he was given the names of favorable witnesses to be interviewed. (See Tr. PCRA Hr'g 4/21/95 at 27) ("Q: Okay. Did you interview witnesses, potential witnesses? [Mr. Donatoni]: There were none given to me").

Therefore, I cannot say that the failure to call these

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[7] Proudfoot insinuates that Mr. Derrickson lied at trial by denying the existence of an actual plea bargain. Proudfoot bases this perjury allegation on testimony later given by Mr. Derrickson before The Honorable Norma Shapiro -- of this Court -- in a subsequent civil suit brought by Proudfoot. (See Tr. Trial Proudfoot v. Chenger, No. 89-4290, 9/18/90 at 14, 16). Even assuming Mr. Derrickson perjured himself by denying at trial the existence a plea bargain with the Commonwealth, this does not advance Proudfoot's claim of ineffective assistance of counsel.

[8] Here, Proudfoot is presumably referring to Randy Collins, Mark Taylor, William Stringer, Richard Yosemite Sexton and Trooper Williams.

witnesses was deficient under Strickland. Even assuming, however, that Proudfoot did give the names of other witnesses to counsel and that his failure to call them at trial was deficient, Proudfoot nonetheless presents no persuasive evidence that these witnesses "would have changed the result of his trial." Reese v. Fulcomer, 946 F.2d 247, 257 (3d Cir. 1991), cert. denied, 503 U.S. 988, 112 S. Ct. 1679 (1992). In this regard, I agree with Magistrate Judge Rueter's finding that:

> [a]ccording to [Proudfoot], these witnesses would have established that Thomas was involved in the theft of the motorcycles, and [Proudfoot] was unjustly accused of stealing them by law-enforcement officials and members of the Pagan's Motorcycle Gang.[9] With this testimony, [Proudfoot] would have argued to the jury that the only reason he confronted Thomas was to exculpate himself, not for money as the prosecution alleged. However, even if these witnesses were to establish these facts, it is not likely that the jury would have excused petitioner from committing the terroristic threats and assaults upon Thomas and his wife. If anything, these facts would have only intensified [Proudfoot's] motive to threaten Thomas rather than diminish it.

(R & R at 28).[10]

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[9] Magistrate Judge Rueter's statement of the defense strategy is corroborated by Proudfoot's own statement that his "theory of the defense was that he had been accused of the theft of the motorcycles and was afraid he would either be charged with that theft, hurt, or killed by the Pagan's if the bikes [which were stored on Thomas' property] were not returned." (Pet'r Mem. at 6).

[10] The Supreme Court of the United States has extended the right to effective assistance of counsel to appeals. Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836 (1985) ("[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney"). Proudfoot argues that his appellate counsel was ineffective in refusing to raise any issues on direct appeal except the legal sufficiency of the evidence on the mistaken belief that "he could only raise those issues that were

D. Remaining Objections

Proudfoot and Respondents have lodged several other discrete objections to the R & R.

1. Proudfoot

Proudfoot asserts that "Magistrate Judge Rueter erroneously determined that there is no right to counsel in Post Conviction Proceedings in Pennsylvania." (Pet'r Mem. at 42). Magistrate Judge Rueter only determined that there is no federal Constitutional right to counsel in PCRA and, in so doing, relied on clear language from Finley, 481 U.S. at 557, 107 S. Ct. at 1994 (stating that when states provide post-conviction proceedings "the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well").

Proudfoot next asserts that "[t]he Magistrate Judge erroneously concluded that there is no right to appeal a denial of an adverse decision in a [state] Motion for Post Conviction Relief." (Pet'r Mem. at 43). The Court need not decide this question of state law as it is of no moment in adjudicating any of the federal claims at bar.

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preserved at trial for review." (Pet'r Mem. at 30). Assuming this constituted a deficiency under Strickland, Proudfoot fails to demonstrate in what way he was prejudiced. He has now had two courts -- this habeas Court and the state PCRA trial court -- review his claims relating to matters other than the sufficiency of the evidence. Therefore, I find it likely that the Superior Court, on direct review, would still have affirmed even if it had considered the full panoply of Proudfoot's post-trial defenses.

Proudfoot next argues that "[t]he Magistrate Judge erroneously concluded that the delay in the adjudication of the petitioner's appeal from Judge Sugerman's denial of the petitioner's Post Conviction Relief Action was largely due to counsel's failure to file a [Pennsylvania Rule of Civil Procedure] 1925(b) statement." (Pet'r Mem. at 44). Whether that delay is attributable to counsel or the courts is beside the point since there is no federal Constitutional right to a speedy PCRA proceeding.

2. Respondents

Respondents first object to the legal conclusion "that Petitioner need not exhaust his pending state court remedies." (Resp't Objections Magistrate Judge's R & R at 1). This issue was addressed in the Court's Order dated January 29, 1997, (see Doc. No. 56), and shall not be revisited.

Finally, Respondents take exception to Magistrate Judge Rueter's prediction that the Third Circuit "would make a limited exception" to the rule that inordinate delay in PCRA poses no Constitutional violation. Magistrate Judge Rueter found, and I agree, that even if such an exception existed in this Circuit, Proudfoot would not qualify therefor. (See R & R at 20). Thus, it is not necessary for the Court to evaluate the cognizability of that exception.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT WILLIAM PROUDFOOT	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
DONALD T. VAUGHN, ET. AL.	:	NO. 94-590

O R D E R

AND NOW, this 2nd day of July, 1997, upon consideration of the Report and Recommendation of Magistrate Judge Thomas J. Rueter (Doc. No. 66), Objections thereto by Petitioner Robert William Proudfoot (Doc. No. 67) and Respondents Donald T. Vaughn, the Pennsylvania Attorney General and the District Attorney of Chester County (Doc. No. 68), and the Memorandum of Law in Support of Petitioner's Objections (Doc. No. 70), **IT IS HEREBY ORDERED THAT:**

1. Petitioner's Objections **ARE OVERRULED**.

2. Respondents' Objections **ARE OVERRULED**.

3. The Report and Recommendation **IS APPROVED** and **ADOPTED** for the reasons stated in this Court's Memorandum.

4. The Petition for Writ of Habeas Corpus (Doc. No. 1) **IS DENIED**.

5. The Petition for an Evidentiary Hearing (Doc. No. 64) **IS DENIED**.

6. The Petition for Release from Custody Pending Decision on Petition for Habeas Corpus Relief (Doc. No. 43) **IS DENIED**.

7. The Clerk of Court **SHALL MARK** this case **CLOSED**.

BY THE COURT

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John R. Padova, J.